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No. 96-1090

In The

Supreme Court of the United States

October Term, 1996

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

CLYDE SIRBAUGH, JR.,

Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Berkeley County, West Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a railroad, in an asbestos-related disease claim under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, should be entitled to an apportionment of damages jury instruction, where the railroad's defense and only trial evidence was that Respondent did not have any lung injury and, where the railroad presented no evidence of any contributory fault by the Respondent.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	3
I. Review Should Be Denied Because The Question Of Apportionment Under the F.E.L.A. Was Not Preserved.	4
A. "Smoking"	5
B. "Any Cause Other Than Defendant's Alleged Negligence"	6
II. There Is No Substantial Conflict Among The Lower Courts On The Issues Of Apportionment Of Damages And Contributory Negligence, Nor Is There Any Conflict With Opinions Of This Court.	8
Conclusion	11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Birchem v. Burlington Northern Railroad Co., 812 F.2d 1047 (8th Cir. 1987) 7

Dale v. Baltimore & Ohio Railroad Company, 552 A.2d 1037 (Pa. 1989) 8, 9, 10

Denton v. Southern Railway Company, 854 S.W. 2d 885 (Tenn. App. 1993) 8

Farmer v. Pennsylvania Railroad, 311 F. Supp. 1074 (W.D. Pa. 1970) 6

Rice v. Sioux City Memorial Park Cemetery, Inc., 75 S. Ct. 614 (1955) 9

Robertson v. Burlington Northern Railroad Co., 785 S.W. 2d 626 (Mo. App. 1990) 7

Rogers v. Missouri Pacific Railroad, 352 U.S. 500, 77 S. Ct. 443 (1957) 7

Taylor v. Burlington Northern Railroad, 787 F.2d 1309 (9th Cir. 1986) 7

Wissman v. Wissman, 575 S.W. 2d 239 (Mo. App. 1978) 7

Contents

Page

Statute Cited:

45 U.S.C. § 51, *et seq.* i

APPENDIX

Appendix A — Excerpts from Transcript 1a

STATEMENT OF THE CASE

Petitioner, CSX Transportation, Inc. ("CSXT"), is a railroad operating in the United States, including in West Virginia. The Respondent, Clyde Sirbaugh, Jr., was employed as a trackman in one of the railroad's regional gangs whose duties included maintenance of the tracks. Sirbaugh was employed with Petitioner and its predecessor companies from 1964 through 1987.

In 1987, Sirbaugh retired from CSXT as a result of angina. In late 1991, he began to experience continuous shortness of breath. His treating physician referred him to a pulmonary specialist, Dr. Robert E. Bowen. Dr. Bowen suspected a connection between Sirbaugh's breathing difficulties and his prior work exposure to asbestos. Subsequent pulmonary function tests and x-rays confirmed Dr. Bowen's diagnosis of pulmonary fibrosis, particularly asbestosis or asbestos-related disease.

Contrary to the CSXT's assertion that Sirbaugh's exposure to asbestos was "extremely limited," Sirbaugh showed at trial a significant and prolonged exposure to asbestos during his employment. Sirbaugh and three co-workers described for the jury an operation they engaged in during the cold weather season for years called "pull-aparts." In this operation trackmen were assigned to reconnect segments of railroad track which had been pulled apart by contraction caused by the cold weather. To accomplish this, they were required to lay 50-foot strands of asbestos rope soaked in diesel fuel next to the contracted track. This rope was then ignited and the heat generated expanded the metal, allowing the trackmen to reconnect the track. None of these workers was given protection from the inhalation of fibers given off by burning asbestos rope. Sirbaugh presented uncontradicted testimony that the rope would be reused until it was reduced to nothing.

Sirbaugh also presented evidence that asbestos fibers would become airborne, being noncombustible, during these pull-apart operations. Neither Sirbaugh nor any of his co-workers were warned of the risks of asbestos, were given any protection against airborne asbestos, or were ever tested for the presence of asbestos in their lungs.

CSXT's statement of the facts characterized Sirbaugh's claim for damages as being related to "respiratory ailments" and noted that it was "undisputed that the Respondent smoked cigarettes, that he was significantly overweight, and that he had a heart condition." This is a gross over generalization and mischaracterization of the facts presented below.

CSXT's defense at trial was that Sirbaugh had a restrictive lung impairment *solely* caused by obesity and did not have asbestosis or asbestos-related disease. Its case consisted of two expert witnesses, Dr. Joseph Renn (a pulmonologist) and Dr. Jerome Wiot, (a radiologist). Their testimony was that Sirbaugh did not have any asbestos-related disease; and that Sirbaugh's chest x-rays and CT scans showed he had normal lungs. Thus, CSXT's chosen defense was that Sirbaugh had no injury caused by occupational exposure to asbestos, or even any lung injury. Further, CSXT's medical experts were not asked a single question, nor did they give a single opinion, that smoking cigarettes had caused Sirbaugh any injury.

Sirbaugh sought damages only for injuries to his lungs caused by exposure to asbestos and the jury was so instructed. The trial judge and trial counsel for CSXT both agreed that the sole defense issue in the case was whether Sirbaugh had asbestosis or asbestos- related disease. Without any objection from CSXT, the trial judge provided the jury with three special interrogatories which were to be answered by the jury, as follows:

> 1. Has Plaintiff, Clyde Sirbaugh, Jr., proven by a preponderance of the evidence that he suffers from asbestosis or asbestos-related disease?
>
> 2. Did the Plaintiff's asbestosis or asbestos-related disease result in whole or in part from negligence on the part of the Defendant, CSX Transportation, Inc.?
>
> 3. What, if any, damages has the Plaintiff established as being the result of such negligence?

(*See* Appendix, *infra*, 3a). Finally, in addition to other instructions, the trial judge instructed the jury as follows:

> . . . The Court instructs the jury that the fact that instructions have been given you on the subject of damages should not be taken by you as an intimation on the part of the Court that the Defendant is or is not liable for the *alleged lung injury* and damages complained of.

(Emphasis added). (*See* Appendix, 6a).

REASONS FOR DENYING THE WRIT

CSXT, contrary to the assertions in the Petition, maintained below that there was no link between Sirbaugh's "problems" and his exposure to asbestos. CSXT's position, from the pre-trial motions through final jury argument, was that Sirbaugh had no symptoms even remotely resembling asbestosis or asbestos-related disease and that he was not sufficiently exposed

to asbestos to have contracted the disease. Similarly, despite its present contentions, CSXT presented no trial evidence that smoking or heart ailments contributed to the restrictive lung defect caused by asbestosis. In fact, CSXT's trial evidence, consisting of two medical doctors, Dr. Wiot and Dr. Renn, was that their examinations of Sirbaugh led them to conclude Sirbaugh's lungs and heart were functioning normally. No evidence was presented as to Sirbaugh's weight during the time of his exposure and employment.

Given the posture and development of CSXT's theory of the defense, the jury was properly given the choice to decide whether Sirbaugh's restrictive lung impairment was caused by negligent conduct of CSXT in exposing him to asbestos or was caused by something else, *i.e.*, obesity. CSXT did not wish for the jury to apportion damages. If it had, the logical method to accomplish apportionment would have been either to admit that Sirbaugh suffered from asbestosis or asbestos-related disease or introduce such proof to the jury.

I.

REVIEW SHOULD BE DENIED BECAUSE THE QUESTION OF APPORTIONMENT UNDER THE F.E.L.A. WAS NOT PRESERVED.

It is only before this Court — and for the first time — that CSXT has indicated a connection or possible connection between Sirbaugh's work environment and his asbestosis or asbestos-related disease. CSXT has to take that position *now*, otherwise its Petition For Writ Of Certiorari before this Court would be unfounded. Therefore, it now takes a position wholly inconsistent with that which it asserted throughout every previous proceeding. In other words, CSXT cannot make any type of argument regarding an apportionment unless they agree

that at least a portion of Sirbaugh's asbestosis or asbestos-related disease was, in fact, caused by his work environment. This is not to say that CSXT could not take an inconsistent position with regard to Sirbaugh's *damages*; but here the carrier attempts to take an inconsistent position on whether Sirbaugh even suffered an injury. This, and any argument regarding apportionment, was eliminated by the jury's answer to the special Interrogatory in which the jury found that Sirbaugh *was suffering* from asbestosis or asbestos-related disease.

CSXT's Request for Charge No. 14, refused by the trial court, stated, in pertinent part:

> Thus, the plaintiff cannot recover for any injury or disease caused by smoking, nor can he recover for any aggravation of a work-related injury or disease which you find to have been caused by smoking or by any cause other than the Defendant's alleged negligence.

A. "Smoking"

This, the centerpiece of CSXT's proposed jury instruction, was unsupported by the evidence adduced at trial, in the following respects.

1. CSXT presented *no* evidence that smoking ever resulted in *any* injury to Sirbaugh's lungs or in any lung disease.

2. The uncontroverted evidence was that Sirbaugh quit smoking cigarettes nearly 20 years before the trial and that his quitting pre-dated any manifestation of his asbestos-related disease.

3. CSXT presented *no* evidence that cigarette smoking aggravated any pre-existing lung disease or injury, or even that Sirbaugh had a pre-existing lung injury or disease when he smoked.

4. CSXT presented no evidence that Sirbaugh's smoking pre-disposed him to asbestos-related disease or caused his injuries. *See Farmer v. Pennsylvania Railroad*, 311 F. Supp. 1074 (W.D. Pa. 1970) (there was no error in refusing to submit issue of contributory negligence to jury where there was no affirmative evidence presented by railroad that, by smoking, Plaintiff ran risk of contracting tuberculosis).

B. "Any Cause Other Than Defendant's Alleged Negligence"

CSXT did not request that the apportionment of damages instruction include the issue of Sirbaugh's heart condition. This is likely because CSXT's own medical expert testified at trial that Sirbaugh's coronary artery disease was ". . . *not of the extent that you would expect it to be contributing to his shortness of breath.*" (Emphasis added). (*See* Appendix, 5a).

As for Sirbaugh's obesity, CSXT obviously found it most expedient at trial to present its evidence that obesity was the sole cause of Sirbaugh's breathing defect, and that he had no pulmonary fibrosis or asbestos-related disease. The jury was adequately instructed on this issue. Not only was the jury given special interrogatories which provided that if they did not believe Sirbaugh had proved his claim of asbestosis or asbestos-related disease, they were to find in CSXT's favor, but also it was instructed specifically that Sirbaugh was seeking damages only for a lung injury. The position now asserted by CSXT is vitiated by the testimony of its expert, Dr. Renn, that obesity would not injure the lungs, but would restrict breathing via pleural fat deposits in the chest, not the lungs.

Thus, CSXT's instruction was not refused on the basis of *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 77 S. Ct. 443 (1957), but for the reasons set forth in *Birchem v. Burlington Northern Railroad Co.*, 812 F.2d 1047 (8th Cir. 1987). In *Birchem*, the court set forth the black-letter law that where there is no evidence to support a theory of contributory negligence, it is reversible error to give such an instruction.[1] There was no evidence to submit the issue of contributory negligence to the jury.

Refusal of the tendered instruction was also appropriate on the basis that it was insufficiently particular to guide the jury in its decision. An instruction such as this would give a jury a roving commission and would have provided no guidance as to what the phrase "other causes" could apply to. *See, e.g., Robertson v. Burlington Northern Railroad Co.*, 785 S.W. 2d 626 (Mo. App. 1990), citing *Wissman v. Wissman*, 575 S.W. 2d 239 (Mo. App. 1978).

Because these independent grounds were appropriate under long extant common law standards, this case does not represent a matter of overall significance worthy of Certiorari to this Court.

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1. Indeed, Sirbaugh's obesity, smoking, or heart condition would not be considered contributory negligence in any event. Contributory negligence is a careless act or omission on the plaintiff's part in the workplace tending to add new dangers or conditions that the employer negligently created or permitted to exist. *Taylor v. Burlington Northern Railroad*, 787 F.2d 1309 (9th Cir. 1986). There was no indication or evidence whatsoever that Sirbaugh did anything in the work place or anywhere else that tended to add new dangers to the conditions that CSXT negligently created or permitted to exist. None of these purported "other causes" rise to the level of contributory negligence under the F.E.L.A. Likewise, as stated above, no evidence was presented showing whether Sirbaugh was obese during his period of employment and exposure to asbestos, nor was any evidence presented as to damages caused or made likely by smoking.

II.

THERE IS NO SUBSTANTIAL CONFLICT AMONG THE LOWER COURTS ON THE ISSUES OF APPORTIONMENT OF DAMAGES AND CONTRIBUTORY NEGLIGENCE, NOR IS THERE ANY CONFLICT WITH OPINIONS OF THIS COURT.

CSXT cites the holding in *Dale v. Baltimore & Ohio Railroad Company*, 552 A.2d 1037 (Pa. 1989), to support an alleged conflict in the lower courts in interpreting the Federal Employers' Liability Act, regarding the issues of apportionment of damages and contributory negligence. There is no serious conflict among the lower courts on this issue. *Dale*, has never been cited favorably by another court in the United States for the proposition that there must be an apportionment of damages where an employee has been injured partially by the railroad's negligence and partially by other causes; regardless of whether those causes relate to a pre-existing condition or to a concurrent, contemporary cause or whether there is contributory negligence by the employee. No other court has held that there should be apportionment in the absence of a showing of contributory negligence by the employee. Not only was there a forceful dissenting opinion in *Dale*, but the court in *Denton v. Southern Railway Company*, 854 S.W. 2d 885, 888 (Tenn. App. 1993), emphasized that the *Dale* holding is, ". . . contrary to the wording of the statute, [and] *no other Court has employed this analysis for establishing damages*."[2] (Emphasis added).

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2. The dissenting judge in *Dale* believed strongly that the rule set forth in *Dale* was erroneous and stated that,

> to hold that an employer's damages may be reduced under the instant circumstances seems to me to be directly contrary to the language and spirit of

(Cont'd)

Even more important, *Dale* does not present a conflict or a substantial federal question. As this Court stated in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 75 S. Ct. 614 (1955):

> A federal question raised by Petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

CSXT, having unsuccessfully pursued a trial strategy of asserting that Sirbaugh has no lung injury and had not been sufficiently exposed to asbestos to have contracted asbestosis or asbestos-related disease, now asks this Court to allow it to have its cake and eat it too. It does so by misrepresenting the facts as follows:

1. CSXT asserts for the first time, that Sirbaugh's "respiratory problems" arguably had some link to asbestos although when its defense below was based on the theory that Sirbaugh was not sufficiently exposed to asbestos to have contracted any disease, and that he had no occupational injury to his lungs.

2. CSXT asserts that the jury was ordered to disregard other causes for the injury, when, in fact, the jury was given a choice

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(Cont'd)

> *Rogers* . . . the pro-labor policies of the Act will be insensibly undermined by the unprecedented anti-worker holding of the majority. Simply put, the Rule is and ought to be thus wise: the employer as tort feasor under this Act must take its victim as it finds him.

(*Dale* at 1045).

to decide consistent with CSXT's defense whether Sirbaugh's lung injury was caused by asbestos exposure, or by obesity, according to the special interrogatories given to the jury and appended hereto. (*See* Appendix, 3a). The jury was not affirmatively ordered to disregard anything.

3. CSXT overgeneralizes Sirbaugh's claim for damages as resulting from "respiratory ailments," when, in fact, Sirbaugh's evidence was about a particular respiratory ailment, pulmonary fibrosis and/or asbestos-related disease.

Even assuming *arguendo* that *Dale* represents a significant conflict among the lower courts on this issue, CSXT's argument fails. CSXT, at trial, failed to produce a single shred of evidence to support its assertion that Sirbaugh had any other lung disease or injury, or that he was contributorily negligent.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM TRANSCRIPT

Closing Argument, Attorney Luke A. Lafferre

* * *

[69] . . ., Clyde Sirbaugh doesn't have any asbestos-related disease. He doesn't have any asbestos-related condition. He doesn't have any asbestos-related injury of any kind. And that's what we said we'd prove to you at the beginning of this case, and that's what we have done. We said we would prove that to you, even though it is not our burden to do that.

* * *

[81] Doctor Wiot looked at the CT films and talked about in the deposition that we played what good quality the Winchester films were and how they showed what needed to be shown. You could tell whether they had pleural plaques. And he didn't know what Doctor Renn had said. And independently on his own he looked at CT films and said that he does not — Mr. Sirbaugh does not have pleural plaques or any abnormalities consistent with asbestos-related disease. He said the same thing with the chest x-ray films.

* * *

[82] Doctor Wiot looked at all of them and found that based on his interpretation of them, Mr. Sirbaugh, as far as lung disease went and pleural plaques went and all those kinds of things, that he had an essentially normal chest.

* * *

[83-84] And he graded the x-ray films of Mr. Sirbaugh and determined that none of them showed any abnormality consistent with any asbestos-related disease. You remember also that Doctor Wiot said if there had been anything else on there, he would have reported if it was cancer, if it was some other dust related disease, or if he had anything else, he would have reported it because he has a duty to do that. But there was nothing wrong with Mr. Sirbaugh except as Doctor Wiot noted from looking at the x-ray films he had put on a lot of weight very quickly, and he wondered why. We told him it was because of the Prednisone.

So, those two witnesses taken together show quite clearly again Mr. Sirbaugh doesn't have any asbestos-related disease or condition of any kind.

Appendix A

Interrogatories

* * *

[126] COURT: Sir, would you hand the form to the Bailiff and he will hand it to me? Madam Clerk, would you please read the questions and the responses to the questions that were answered?

CLERK: "In the Circuit Court of Berkeley County, West Virginia, Clyde Sirbaugh, Plaintiff versus CSX Transportation, Inc., Defendant, Case Number 93-C-590. Question 1, has Plaintiff Clyde Sirbaugh proven by a preponderance of the evidence that he suffers from asbestosis or asbestos-related disease? Answer yes. Question 2, did the Plaintiff's asbestosis or asbestos-related disease result in whole or in part from negligence on the part of the Defendant CSX Transportation, Inc.? Answer yes. Question 3, what if any damages has the Plaintiff established as being the result of such negligence?

Appendix A

CSX Transportation, Inc. IME, Dr. Joseph Renn

* * *

[32-33] Q. After taking the history, did you do a physical examination on Mr. Sirbaugh?

A. Yes.

Q. What did you find out from the physical examination?

A. I found out that he had normal blood pressure. That he was five feet seven inches, weighed 271 pounds. Examination of his heart was normal. Examination of his lungs was normal.

* * *

[99-100] Q. Now based on your review of the CT scans and the chest x-rays of Mr. Sirbaugh, does he have any disease or even any condition or finding that is resulting from exposure to asbestos?

A. No. The additional advantage to this is that you can also look at the lung tissue and tell whether or not there is any scarring that would occur from asbestos exposure. And there is a certain pattern that occurs in high resolution CAT scans.

Q. These scarring — scarring that you talked about, are those the small opacities that you talked about in regard to plain film chest x-rays?

A. Yes. And you see none of the pattern which is typically associated with exposure to asbestos disease. There is a whole

textbook written on high resolution CAT scanning. And it gives all the criteria for asbestosis by high resolution CAT scan. And there is nothing in here that even remotely approaches what is required for asbestosis.

* * *

[102-103] Q. Now, Doctor Renn, then based on your review of the hundreds of pages of medical records on Mr. Sirbaugh that we talked about, and your review of all these records that you did, your review of the 20 some chest x-ray films that were done before you saw Mr. Sirbaugh, and the films that were actually done on Mr. Sirbaugh at your office, and also considering the results of the testing that you have had done and the CT scans that you had done on Mr. Sirbaugh, do you have an opinion to a reasonable degree of medical certainty whether he has any condition, any condition, any finding consistent with exposure to asbestos?

A. Yes.

Q. And what is that opinion?

A. He does not.

* * *

[104] Q. What part would his cardiac condition play in that?

A. Well, he has — he had a cardiac catheterization which revealed that he had coronary artery disease, but it is not of the extent that you would expect it to be contributing to his shortness of breath . . .

Appendix A

Jury Instructions

* * *

[16] Clyde Sirbaugh, Junior, claims that as a result, either in whole or in part, or any and/or all of the negligent acts claimed above, he was injured.

The railroad denies that it or its employees or officers or agents were negligent in any of the ways claimed by Clyde Sirbaugh, Junior. It also claims that Clyde Sirbaugh, Junior, was not injured.

* * *

[29] The Court instructs the jury that the fact that instructions have been given you on the subject of damages should not be taken by you as any intimation on the part of the Court that the Defendant — I'll begin again. The Court instructs the jury that the fact that instructions have been given you on the subject of damages should not be taken by you as an intimation on the part of the Court that the Defendant is or is not liable for the alleged lung injury and damages complained of. Such liability is to be determined solely by you based upon the evidence in the law as incorporated in these instructions.